Hawaiian Telcom

REDACTED – FOR PUBLIC INSPECTION

December 23, 2014

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations,
MB Docket No. 14-57

Dear Ms. Dortch,

Hawaiian Telcom Services Company, Inc. ("Hawaiian Telcom") hereby submits its Reply Comments in the above-named docket, portions of which are designated highly confidential.

In accordance with the Protective Orders issued in this proceeding[1], all pages of this filing, submitted via the Commission's Electronic Comments Filing System ("ECFS"), are marked "REDACTED – FOR PUBLIC INSPECTION". Also in accordance with the Protective Orders, a confidential copy of these comments has been sent via overnight delivery to the Office of the FCC Secretary, and was marked "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO MODIFIED JOINT PROTECTIVE ORDER IN MB DOCKET NO. 14-57 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION".

Please contact me at (808) 546-3877 if you have any questions pertaining to this filing.

Sincerely,

Steven Golden
Vice President, External Affairs

Enclosure

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[1] *Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 14-57, Modified Joint Protective Orders, DA-14-1463 ("Joint Protective Orders)*

REDACTED – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of	)	MB Docket No. 14-57
	)	
Comcast Corp. and Time Warner Cable Inc.	))	
	)	
For Consent To Assign or Transfer Control of Licenses and Authorizations	))	

REPLY COMMENTS OF
HAWAIIAN TELCOM SERVICES COMPANY, INC.

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December 23, 2014

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INTRODUCTION

Hawaiian Telcom Services Company, Inc. ("Hawaiian Telcom") respectfully submits these Reply Comments in response to the Opposition to Petitions to Deny and Response to Comments ("Opposition") filed on September 23, 2014 by Comcast Corporation ("Comcast") and Time Warner Cable ("TWC") (Comcast and TWC collectively, "Applicants"). Nothing contained in the Opposition undermines the arguments Hawaiian Telcom made in its Comments, filed August 25, 2014 ("Hawaiian Telcom Opening Comments").

The basic facts remain: (1) The Commission must examine the effect of the proposed merger in local geographic markets; (2) the effects of the proposed merger are uniquely harmful in the Hawaii market; (3) because of Hawaii's distant location and unique climate, competition from DBS is insignificant in the Hawaii market; (4) substantial numbers of Hawaiian Telecom customers purchase video and broadband in a bundle, and DBS providers do not offer video and broadband in a bundle that is attractive to Hawaii consumers; (5) larger purchasers of programming pay significantly less for the same programming; (6) aggregation of Comcast's and TWC's purchasing power will result in a widening of the program cost gap between them and wireline overbuilders such as Hawaiian Telcom, giving the merged company the ability to drive out competition, particularly in Hawaii, and raise prices; and (7) the combination of Comcast's significant share of desirable programming and TWC's monopoly market share over distribution in Hawaii in a single company will give that company the incentive and power to drive out competition by raising costs for programming that rivals such as Hawaiian Telcom must pay.

I. The Merger Creates Unique Harm in the Hawaii Market

In its opening comments, Hawaiian Telcom showed that the proposed merger affects competition in Hawaii more adversely than it affects the rest of the country because geographic differences result in DBS providers playing a much less significant role in the Hawaii market, with a combined DBS market share of approximately 5%.[1] In their Opposition, Applicants engage in sleight of hand. First they agree with Hawaiian Telcom that the relevant geographic market for MVPD service is local.[2] On the next page, however, they launch into a discussion of DBS market share on a national basis, claiming that DBS providers "have been enormously successful in competing with cable providers," and citing only national data.[3] Applicants' discussion culminates in quotation of a reply declaration that DBS providers have a 34% share of national MVPD subscribers.[4]

Hawaiian Telcom and Applicants agree that the market for MVPD services is local, but Applicants have offered no evidence to contradict Hawaiian Telcom's assertion that DBS providers have only a 5% market share in Hawaii. Hawaiian Telcom has explained the technical reasons for this.[5] Applicants do not even attempt to rebut this showing, apparently hoping that the Commission will ignore Applicants' concession that the relevant geographic markets are local and/or pay no attention to the impact of the transaction in Hawaii. The fact that strong DBS competition may exist in other geographic regions of the country does not help consumers in the state of Hawaii, who unlike their mainland counterparts, cannot look upon DBS as a viable alternative to a wired TV service from Time Warner Cable, and who did not have any significant competitive paid TV service until Hawaiian Telcom launched its service in 2011. The Commission has the obligation to protect consumers in all local markets within its jurisdiction,

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[1] Hawaiian Telcom Opening Comments at 7 ("Hawaiian Telcom Comments").

[2] Opposition at 138.

[3] *Id.* at 139.

[4] *Id.* at 142; *see id.* at 139-42.

[5] Hawaiian Telcom Comments at 7.

even one as distant as Hawaii, from the adverse effects of mergers. If a merger has different impacts in different local markets, even though the Commission may approve the merger it has not hesitated to impose relief in those markets that are adversely affected. For example, the Commission stated in *In the Matter of Applications of AT&T Wireless, Inc. and Cingular Wireless Corporation* that "while we find that anti-competitive unilateral effects are unlikely in most markets, however, there are specific markets in which competitive conditions are sufficiently different such that unilateral effects pose a threat to competition."[6] In such cases, the Commission has routinely imposed conditions that are focused on the local markets where competition is threatened. Such an approach is appropriate here.

II. The Commission Must Examine the Effect of the Merger on the Market For A Bundle Consisting of Video and Wired Broadband

In its opening comments, Hawaiian Telcom showed that consumers have a strong preference for purchasing a bundle of services, consisting of video and wired broadband, from the same provider, and DBS providers do not provide effective competition in this market because they cannot offer a comparable bundle.[7] Such bundles are typically marketed at a price that is less than the sum of the prices of the components, and the customer has the added convenience of receiving a single bill and dealing with a single provider.

Applicants do not attempt to rebut the factual showing of Hawaiian Telcom and others that the vast majority of purchasers buy video and wired broadband from a single supplier. Instead, they offer several arguments, none of which is supportable. First, Applicants rely on the 2006 *Adelphia* case for the proposition that there is not a market for bundled service.[8] That case

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[6] 19 FCC Rcd. 21522, ¶ 149 (2004).

[7] Hawaiian Telcom Comments at 7.

[8] Opposition at 137-38.

was 8 years ago, and even then, the Commission did not independently examine whether a market for bundled products exists. Rather, it stated that in past transaction reviews (which are even more remote in time than 2006), the Commission found that the relevant product market is all MVPD services.[9] The market has changed. Broadband is a much more important adjunct to video than it was in 2006. Indeed, in a recent speech, Chairman Wheeler provided support for the bundle principle advocated by Hawaiian Telcom, suggesting that "broadband becomes more economically viable" when it is "bundled with video services."[10]

Applicants also cite the DC Circuit's decision in *Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009).[11] But the language they quote states that the Commission "'did not point to any evidence' showing that there was a significant set of bundle customers who would not switch to DBS."[12] Here, the record evidence that only 5% of MVPD customers in Hawaii use DBS service, along with Hawaiian Telcom's technical evidence about the unique deficiencies of DBS service in Hawaii,[13] shows that many MVPD customers in Hawaii do not find DBS to be an adequate substitute for TWC's MVPD service.

Second, Applicants cite national data to show that DBS providers have been gaining

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[9] *Adelphia Commc'ns Corp. (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Commc'ns Corp., (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corp. (Subsidiaries), Assignees and Transferees*, Memorandum Opinion and Order, 21 FCC Rcd. 8203 ¶ 63 (2006) ("*Adelphia Order*").

[10] Remarks of Chairman Wheeler at National Association of Telecommunications Officers and Advisors Annual Conference, October 1, 2014, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1001/DOC-329707A1.pdf

[11] Opposition at n. 424.

[12] *Id.*

[13] Hawaiian Telcom Comments at 7.

share in the national market.[14] As discussed above, national data tells us nothing about the success of DBS in Hawaii, and Applicants have not challenged Hawaiian Telcom's showing that DBS providers have been unable to compete effectively in Hawaii.

Third, Applicants assert that "DBS customers can create their own bundle using Comcast's Internet and voice services and DBS video service."[15] Presumably, in Hawaii, this would be a bundle that uses TWC's Internet and voice services and DBS video service, rather than Comcast's. But that is not a bundle at all. The essence of a "bundle" is that the customer purchases two or more products <u>from the same supplier</u> and obtains a discounted bundle price, and the convenience of a single bill and dealing with a single supplier. What Applicants describe might be better referred to as an "anti-bundle," in which the customer eschews the benefits of a bundle and buys separate services from separate suppliers. Given the DBS providers' very small shares of the video market in Hawaii, it should be self-evident that few customers take this approach. Indeed, it is quite likely that some of the limited number of Hawaii residents who purchase video from DBS providers are also among the small group of customers for video that do not buy broadband at all.

Fourth, Applicants argue that "DBS providers have entered into partnerships with incumbent LECs to provide double-play . . . and triple-play . . . bundles.[16] In support, Applicants cite websites of the DBS providers,[17] but a visit to those websites shows that the bundle offerings they promote do not provide a competitive alternative for the Hawaii consumer seeking a bundle of video and broadband. The Dish Network website cited by Comcast itself quite candidly

[14] Opposition at 139.

[15] *Id.*

[16] *Id.* at 139-40.

[17] *Id.* at n. 437.

admits that its satellite broadband is not a good substitute for TWC's or Comcast's broadband. See the following Q&A on the DishNet website:

> Q. The Internet provider at my current location is cable/fiber (FiOS, U-Verse, Comcast, Time Warner, Charter, Cox, AT&T or Verizon). Is dishNET Satellite a good solution for me?
>
> A. NO, As a satellite-based service, dishNET Satellite Internet has monthly data allowance limits which are much lower than cable and fiber-based Internet providers. Additionally, with satellite-based systems signal latency (delay) occurs, which may negatively affect some activities such as realtime gaming and VoIP.[18]

The DIRECTV website cited by Comcast reflects that DIRECTV has no broadband service provider partners in Hawaii. In fact, a DIRECTV video and broadband service bundle simply does not exist in Hawaii.

Before deciding to construct its own IPTV network on Oahu, Hawaiian Telcom considered as an alternative reselling DBS service as part of a bundle. It decided not to do so for several reasons. First, ***BEGIN HIGHLY CONFIDENTIAL** [redacted]

[18] http://www.dish.com/entertainment/internet-phone/ (last visited Sept. 26, 2014).

[redacted] **END HIGHLY CONFIDENTIAL*****

III. The Merger Will Create Harm By Providing The Merged Company With Increased Monopsony Power

In its Opening Comments, Hawaiian Telcom demonstrated that the increased monopsony power that the merger will create will result in harm to consumers.[19] Applicants' responses do not undermine Hawaiian Telcom's showing. First, Applicants argue that Comcast is already so large that merging will not generate more power to drive down the prices they pay for programming. Without support, they claim that discounts appear to be "flattening out with the industry moving to more standard pricing."[20] Hawaiian Telcom does not believe that the evidence will support Applicants' claim that additional purchasing power will not result in lower prices. The Commission will have available data showing the shape of the curve that plots price against volume. It should examine such data carefully and draw its own conclusions, particularly as to whether increased purchasing power will enable Applicants to drive down programming costs in current TWC markets, given that their purchasing power will be more than tripling in those markets.

Comcast also argues that "it would not be advisable for a programmer to create too much differential between one MVPD's prices and another's in the same market, since that could drive subscribers to switch to the MVPD with lower wholesale pricing (and result in less revenue for the programmer), all else being equal."[21] This assumes, without support, that the programmer

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[19] Hawaiian Telcom Opening Comments at 12-15.

[20] Opposition at 157-58.

[21] *Id.* at 158.

will have the ability to hold the line on the discounts it provides to the merged Comcast/TWC. All data shows that to the contrary, larger buyers can extract larger discounts. It is also most unlikely that having been forced to give an increased discount to the merged Comcast/TWC, programmers will then voluntarily increase their discounts to smaller customers such as Hawaiian Telcom, so as to maintain the differential. Indeed, Applicants concede that "like good capitalists, programmers negotiate for the highest rates the market will bear from every MVPD."[22]

IV. Harm Will Result From Increased Program Ownership

In its Opening Comments, Hawaiian Telcom showed that vertical harm would result from combining Comcast's programming power with TWC's distribution power in TWC's local markets.[23] Ignoring the fact that the MVPD in TWC markets will greatly increase its ownership of video programming, Applicants argue that "Comcast will only acquire a small amount of additional video programming from TWC, and even less from Charter.[24]" This completely misses the point. For current TWC markets, such as Hawaii, Applicants are focusing on the wrong metric. In those markets, in which TWC, not Comcast, is the MVPD with a monopoly market share, the relevant metric is whether <u>TWC's</u> program ownership increases appreciably. Based on Comcast's own data, TWC's current share of programming is 0.25% and Comcast's is close to 12%.[25]

Thus, the MVPD's market share of programming in Hawaii will be increasing very appreciably as a result of the merger. The merged company will have an incentive to raise rivals'

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[22] *Id.* at 164.

[23] Hawaiian Telcom Opening Comments at 9-12.

[24] Opposition at p. 240.

[25] *Id.*

costs by forcing them to include all Comcast programming in their basic tier, making the basic tier less affordable for low income customers and less competitive with the merged company's basic cable offering. That incentive did not exist prior to the merger, as the pre-merger Comcast would not profit from raising Hawaiian Telcom's costs.

CONCLUSION

For the reasons set forth above and in its Opening Comments, Hawaiian Telcom respectfully urges the Commission to impose the conditions set forth in its Opening Comments, in Hawaii, if not throughout the United States.

Respectfully submitted,

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